Zainudin bin Maksom v Malaysia Building Society Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(NCvC)(A)-61–02 OF 2019
ZALEHA YUSOF, LAU BEE LAN AND AZIZAH NAWAWI JJCA
25 FEBRUARY 2021

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Civil Procedure — Appeal — Leave to appeal — Foreclosure action by first respondent against appellant — Appellant filed notice of appeal against court's order — First respondent filed notice of motion to strike out appellant's notice of appeal — Whether appellant fulfilled threshold requirement of obtaining leave under s 68(1)(a) of the Courts of Judicature Act 1964 — Courts of Judicature Act 1964 s 68(1)(a)

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This was an appeal by the appellant stemmed from a foreclosure action by the first respondent against the appellant who had failed to pay the outstanding loan amount due. The foreclosure action had been commenced to sell the subject property, a piece of land held together with a semi-detached house erected thereon. Upon a successful auction, the subject property was sold to the successful bidder, the second respondent at the reserve price of RM206,100. A memorandum of contract was executed between the first and second respondents. The appellant sought an order to annul the memorandum of contract but was dismissed. The appellant filed a notice of motion for extension of time to file an appeal but was dismissed. The appellant further filed the present originating summons with the same intitulement as the earlier originating summons and seeking primarily for the same reliefs, but this was also dismissed. The appellant thus filed a notice of appeal against the order and hence the filing of the notice of motion by the first respondent to strike out the notice of appeal. The issue for determination was whether the appellant had fulfilled the threshold requirement of obtaining leave under s 68(1)(a) of the Courts of Judicature Act 1964 ('the CJA').

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Held, striking out the appeal with no order as to costs:

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(1) Having regard to the principle of determining the amount or value of the subject matter of the claim being 'at the time of filing the claim', the value of the subject matter of the claim ie the subject property in question which was the subject of the foreclosure proceedings was RM206,100 as stated in the memorandum of contract entered between the first respondent and the second respondent. As the amount was below the threshold limit of RM250,000, leave of the Court of Appeal was required. The subject of the claim had been identified and its value determined at RM206,100. Therefore, s 68(1)(a) of the CJA was still

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applicable. It was too late in the day to accede to the request of the appellant for a short adjournment to allow the appellant to procure a valuation report from a reputable valuer to determine the current value of the subject property as he contended that the purchase price of RM206,100 was only the reserve price in 2017. The appellant had every opportunity to engage the services of a registered valuer to conduct a proper valuation of the subject property if he had deemed it necessary then. The appellant had failed to challenge the value of subject property (see paras 18 & 20–21).

(2) The appellant's appeal was incompetent as the value of the subject matter of the claim was lower than the requisite amount of RM250,000 provided under s 68(1)(a) of the CJA and leave ought to have been obtained but there was none (see para 22).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu yang berasal daripada tindakan penyitaan oleh responden pertama terhadap perayu yang gagal membayar jumlah pinjaman yang terhutang. Tindakan penyitaan telah dimulakan untuk menjual harta tanah tersebut, sebidang tanah yang dipegang bersama dengan rumah berkembar yang didirikan di atasnya. Setelah berjaya dilelong, harta tanah dijual kepada penawar yang berjaya, responden kedua dengan harga rizab RM206,100. Satu memorandum kontrak telah dilaksanakan antara responden pertama dan kedua. Perayu memohon perintah untuk membatalkan memorandum kontrak tetapi ditolak. Perayu memfailkan notis usul untuk lanjutan masa untuk memfailkan rayuan tetapi ditolak. Perayu selanjutnya memfailkan saman pemula ini dengan tajuk yang sama dengan saman pemula yang sebelumnya dan memohon terutamanya untuk relif yang sama, tetapi ini juga ditolak. Oleh itu, perayu memfailkan notis rayuan terhadap perintah tersebut dan oleh itu pemfailan notis usul oleh responden pertama untuk membatalkan notis rayuan. Isu untuk penentuan adalah sama ada perayu telah memenuhi ambang keperluan untuk mendapatkan kebenaran di bawah s 68(1)(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut').

Diputuskan, membatalkan rayuan tanpa perintah untuk kos:

(1) Dengan mengambil kira prinsip dalam menentukan jumlah atau nilai perkara subjek adalah 'pada saat pemfailan tuntutan', nilai perkara subjek tuntutan iaitu harta tanah yang dimaksudkan adalah subjek prosiding penyitaan adalah RM206,100 seperti yang dinyatakan dalam memorandum kontrak yang dimeterai antara responden pertama dan responden kedua. Oleh kerana jumlahnya berada di bawah ambang had RM250,000, kebenaran Mahkamah Rayuan adalah diperlukan. Subjek tuntutan telah dikenal pasti dan nilainya ditentukan pada RM206,100. Oleh itu, s 68(1)(a) Akta tersebut masih terpakai. Sudah terlambat untuk memenuhi permintaan perayu untuk penangguhan pendek untuk

membolehkan perayu memperoleh laporan penilaian daripada penilai yang berwibawa untuk menentukan nilai semasa harta tanah tersebut kerana dia berpendapat bahawa harga pembelian RM206,100 adalah harga rizab pada tahun 2017. Perayu mempunyai setiap peluang untuk melibatkan perkhidmatan penilai yang berdaftar untuk melakukan penilaian harta tanah yang wajar jika dia menganggapnya perlu ketika itu. Perayu gagal untuk mencabar nilai harta tanah (lihat perenggan 18 & 20–21).

(2) Rayuan perayu adalah tidak kompeten kerana nilai perkara subjek tuntutan adalah lebih rendah daripada jumlah yang diperlukan sebanyak RM250,000 yang diperuntukkan di bawah s 68(1)(a) Akta tersebut dan kebenaran seharusnya telah diperoleh tetapi tiada (lihat perenggan 22).]

Cases referred to

Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh (didakwa sebagai pentadbir harta pesaka Bhagwan Singh s/o Sohan Singh) [2011] MLJU 78; [2011] 3 CLJ 593, FC (folld)

Mohd Tahir bin Mohd Sheriff v Ramlah bt Abdullah [2004] 6 AMR 165 (refd)

Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor [1997] 1 MLJ 136; [1997] 2 CLJ 68, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 68(1), (1)(a)

Appeal from: Originating Summons No JB-24NCvC-323–08 Tahun 2018 (High Court, Muar)

Dinesh Praveen Nair (Dinesh Praveen Nair) for the appellant.
Nurul Nasyira (Aisyah Razak and Iman Sorkapli with her) (Adillah A Nordin) for the first respondent.
(Chris Lee & Partners) for the second respondent.
(Johor State Legal Advisor's Office) for the third respondent.

Lau Bee Lan JCA:

INTRODUCTION

[1] Vide a notice of motion dated 5 April 2019 (encl 11), Malaysia Building Society Bhd, the first respondent (first defendant in the court below) applied to strike out the notice of appeal dated 31 January 2019 filed by Zainudin bin Maksom, the appellant (plaintiff in the court below) and that costs be in the cause.

[2] The first respondent's application was supported by: (a) the affidavit in support affirmed on 1 April 2019 (encl 12), first respondent's affidavit in reply (No 1) affirmed on 22 May 2019 (encl 14) and first respondent's affidavit in reply (No 2) affirmed on 24 September 2019 (encl 24). All the said affidavits were affirmed by one Rozilah bt Rozali.

[3] The appellant opposed the first respondent's application by the appellant's affidavit in reply (No 1) affirmed on 2 May 2019 (encl 13) and appellant's supplementary affidavit affirmed on 29 July 2019 (encl 19). Both affidavits were affirmed by the appellant.

[4] The first respondent's application to strike out the appellant's appeal is premised on the grounds that:

(a) the appellant's appeal did not fulfil the requirement of s 68(1)(a) of the Courts of Judicature Act 1964 (Act 91) ('the CJA');

(b) the appellant's action is estopped by res judicata; and

(c) the appellant's failure to come with 'clean hands' before the court disentitled him to request for the aid of equity.

[5] The appellant's grounds to oppose the first respondent's application, in summary, are:

(a) the underlying reason to strike out the appeal by the first respondent is to stifle the appeal from being heard;

(b) res judicata does not apply as the merits of the appeal were not heard or decided in Originating Summons No JB-24NCvC-269–07 of 2017, its appeal and the court's judgment on 9 January 2019 (made pursuant to Originating Summons No JB-24NCvC-323–08 of 2018);

(c) s 68(1)(a) of the CJA is inapplicable as the appellant's prayers under Originating Summons No JB-24NCvC-323–08 of 2018 are prayers for declarations;

(d) the appellant's Originating Summons No JB-24NCvC-323–08 of 2018 is bona fide; and

(e) striking out should not be allowed on public policy grounds.

[6] Having heard and considered the respective parties' cause papers, written submissions and the oral arguments, we had unanimously allowed the first respondent's application in encl 1, ie struck out the appeal with no order as to costs. Dissatisfied with the decision the appellant has appealed. These are our reasons in respect of the said decision.

BRIEF FACTS

[7] The brief facts relevant to this appeal are these. This appeal stems from a foreclosure action by the first respondent against the appellant who had failed to pay the outstanding loan amount due as follows:

(a) loan amount RM162,000;

(b) monthly instalment RM1,024;

(c) total repayment made by appellant RM4,269.22;

(d) last payment date by appellant 28 March 2006; and

(e) outstanding balance as at 26 December 2012 RM265,118.78 (inclusive of interest).

[8] The first respondent had commenced a foreclosure action against the appellant to sell the subject property, a piece of land held under HSM 1315, PTD5235, Mukim Parit Jawa, Daerah Muar, Johor together with a semi-detached house erected thereon.

[9] The chronology of the foreclosure proceedings in the Muar High Court has been neatly summarised by the appellant as follows: On 9 November 2012, the first respondent commenced foreclosure proceedings Originating Summons No 24 (F)NCvC-697–11 of 2012. Order for sale was granted on 26 December 2012. Between 29 January 2014 to 21 November 2016, six auctions were carried out, some auctions were aborted and some were cancelled as the balance of the auction reserve price was not paid within time. On 13 February 2017, the seventh auction was successful and the subject property was sold to the successful bidder, the second respondent at the reserve price of RM206,100. A memorandum of contract was executed between the first respondent and the second respondent witnessed by the senior assistant registrar of the Muar High Court. On 23 July 2017 the appellant filed Originating Summons No JB-24NCvC-269–07 of 2017 to seek an order to annul the memorandum of contract which was dismissed by Halijah bt Abbas J on 14 December 2017. On 12 February 2018 , the appellant filed a notice of appeal in the Court of Appeal with a notice of motion for extension of time to file the said appeal. The Court of Appeal dismissed the latter on 12 April 2018. On 28 August 2018 the appellant filed Originating Summons No JB-24NCvC-323–08 of 2018 ('the present OS') with the same intitulement as Originating Summons No JB-24NCvC-269–07 of 2017 ('the earlier OS') and seeking primarily for the same reliefs as the present OS. On 9 January 2019, Ahmad Nasfy bin Yasin J dismissed Originating Summons No JB-24NCvC-323–08 of 2018. On 31 January 2019, the appellant filed a notice of appeal against the 9 January 2019 Order. Hence the filing of the

notice of motion dated 5 April 2019 (encl 11) by the first respondent on 5 April 2019 to strike out the notice of appeal against the 9 January 2019 Order.

OUR DECISION

[10] We noted that in the notice of motion in encl 1, there are three grounds upon which the first respondent has mounted to strike out the appellant's notice of appeal as mentioned in para 4 above. In our considered view, the primary and sole issue before us is whether the appellant has fulfilled the threshold requirement of obtaining leave under s 68(1)(a) of the CJA, the failure of which would render the appellant's appeal incompetent and ought to be struck out. The other two grounds of whether the appellant is estopped by res judicata and whether equity can come to the appellant's aid on account of not coming to court with 'clean hands' canvassed by the first respondent are in our view not relevant considerations for the determination of the threshold issue of whether leave is required.

[11] Section 68(1) of the CJA provides, among others, as follows:

> 68 *Non-appealable matters*
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> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
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> (a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit*, except with the leave of the Court of Appeal;

[12] Counsel for the first respondent submitted that the appellant's appeal is incompetent because as to date, no leave under s 68(1)(a) of the CJA has been obtained by the appellant. Counsel argued that leave is required because:

(a) the value of the subject matter before the Court of Appeal is only RM206,100, which is the value of the subject property in the memorandum of contract as exhibited in exh RR1, affidavit in support of the first respondent; and

(b) the loan amount advanced by the first respondent to the appellant is RM162,000 which is even lesser than the value of the subject property as exhibited in exh RR5, first respondent's affidavit in reply (No 1).

[13] To bolster their arguments, counsel relied on a decision of this court in *Mohd Tahir bin Mohd Sheriff v Ramlah bt Abdullah* [2004] 6 AMR 165 at p 167 [5] and [6] and the Federal Court case of *Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh (didakwa sebagai pentadbir harta pesaka Bhagwan Singh s/o Sohan Singh)* [2011] MLJU 78; [2011] 3 CLJ 593 at pp 597 [3] and 600 [18] and [19].

[14] On the other hand, counsel for the appellant in his written submission contended that no leave is required because s 68(1)(a) of the CJA is not applicable. Counsel submitted that in both the present OS and the earlier OS, the appellant has prayed for declarations to be made against the respondents. In support of the proposition that leave of the Court of Appeal is not required for prayers of declaration, Practice Direction No 2 dated 17 June 1996 was cited as follows:

> PERMOHONAN
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> KEBENARAN UNTUK MERAYU KE MAHKAMAH RAYUAN
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> Adalah didapati sehingga kini ada di antara peguam-peguam yang masih samar-samar sama ada sesuatu kes itu memerlukan terlebih dahulu kebenaran Mahkamah Rayuan sebelum notis rayuan boleh difailkan dalam kes-kes yang tidak ada kaitan dengan amaun atau nilai yang tertentu. Maka dengan ini, YAA Presiden Mahkamah Rayuan membuat garis panduan bahawa dalam perkara-perkara seperti berikut kebenaran tidaklah diperlukan:
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> ...
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> (ii) Deklarasi — untuk mengisytiharkan bahawa sesuatu pemberian lesen, perbuatan, peninggalan atau keputusan sesuatu badan atau mana-mana orang yang diberi kuasa oleh undang-undang adalah tidak sah dan terbatal.

[15] Counsel for the appellant further submitted that in any event, the merits of the present OS are related to the validity of the orders given by the deputy registrar and the High Court judge in the earlier OS and not on the value of the land.

[16] It is our respectful opinion that the contention of the appellant is flawed. In our judgment there is merit in the submission of the first respondent that leave under s 68(1)(a) of the CJA is required. First, the Federal Court in *Harcharan Singh s/o Sohan Singh* endorsed the view of this court in *Mohd Tahir bin Mohd Sheriff* at p 599 [12] as follows:

> We agree with the Court of Appeal's decision in *Mohd Tahir bin Mohd Sheriff v Ramlah bt Abdullah* [2004] 1 CLJ 865 that s 68(1)(a) of the Act is unambiguous. It clearly states that no appeal shall be brought to the Court of Appeal when the amount or value of the subject matter of the claim (exclusive of interest) is less than RM250,000, except with leave of the court of Appeal.

[17] Further at p 599 [13] of *Harcharan Singh s/o Sohan Singh*, the Federal Court opined that the phrase 'amount of value of the subject matter of the claim' in s 68(1)(a) of the CJA was considered by the Supreme Court in *Yai Yen Hon v Teng Ah Kok & Sim Huat Sdn Bhd & Anor* [1997] 1 MLJ 136; [1997] 2 CLJ 68 'where it was held that it must be read as the amount or value of the claim filed in the civil suit and not the judgment amount granted against. That would be the determinant factor in deciding whether leave was necessary'.

The said principle was reiterated by the Federal Court at p 600 [21] in answering the second question of law posed by following *Yai Yen Hon* and holding that 'The time for determining the current value of the subject matter of the claim (exclusive of interest) [w]ould be at the time of filing the claim'.

[18] Having regard to the principle of determining the amount or value of the subject matter of the claim being 'at the time of filing the claim' as enunciated in *Harcharan Singh s/o Sohan Singh*, we find that based on the present OS, the value of the subject matter of the claim ie the subject property in question which was the subject of the foreclosure proceedings is RM206,100 as stated in the memorandum of contract entered between the first respondent and the second respondent. As the amount is below the threshold limit of RM250,000, leave of the Court of the Appeal is required.

[19] Secondly, the contention of the appellant that no leave is required since the primary relief are for declarations against the respondents and the appellant's reliance on Practice Direction No 2 of 1996 was an argument similarly ventilated before the Federal Court in *Harcharan Singh s/o Sohan Singh*. This is what the Federal Court had to say at p 600:

> [18] As for the contention that s 68(1)(a) of the Act does not apply because the relief sought by the appellant is for a declaration, we agree with the judgment of the Court of Appeal in *Lam Kong Co Ltd v Thong Guan Co Pte Ltd* where it was held, inter alia, that item (ii) of the Court of Appeal Practice Direction No 2 of 1996 *only applies to declarations respecting subject matters that have no value attached to them or those with values that cannot be quantified*.
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> [19] In the appeal before us, the subject matter of the claim had been identified and its value determined at RM248,500. Therefore we are of the view that s 68(1)(a) of the Act is still applicable. (Emphasis added.)

[20] Following the principle established in *Harcharan Singh s/o Sohan Singh*, we similarly find that in the present OS, the subject of the claim has been identified and its value determined at RM206,100. Therefore contrary to the position taken by the appellant, we are of the considered view that s 68(1)(a) of the CJA is still applicable.

[21] Thirdly, counsel for the appellant during oral submission admitted that he could not find fault with the high authority of *Harcharan Singh s/o Sohan Singh*. Counsel however sought for a short adjournment to allow the appellant to procure a valuation report from a reputable valuer to determine the current value of the subject property as he contended that the purchase price of RM206,100 was only the reserve price in 2017. In our opinion it was too late in the day now to accede to the request of the appellant's counsel as counsel had every opportunity to engage the services of a registered valuer to conduct a proper valuation of the subject property if he had deemed it necessary then.

This is because the first respondent had specifically averred in para 6 of the first respondent's affidavit in support as follows:

> 6. Responden Kedua telah Berjaya membida Hartanah tersebut pada harga rezab sejumlah RM208,100.00 dan satu Memorandum Kontrak telah ditandatangani di antara Responden Pertama dan Responden Kedua ('Memorandum Kontrak tersebut').

But alas we find the appellant had failed to challenge the value of the subject property but had merely averred, among others, the following in paras 6 and 11 of the appellant's affidavit in reply (No 1):

(a) *perenggan-perenggan 3 hingga 15 affidavit responden pertama* (first respondent's affidavit in support) *adalah dinafikan*; and

(b) *saya telah dinasihati oleh peguamcara saya bahawa tindakan yang telah difailkan di Mahkamah Tinggi Muar hanyalah untuk memohon deklarasi-deklarasi dan perintah-perintah terhadap responden-responden dan tidak berkaitan langsung dengan nilai hartanah tersebut.*

CONCLUSION

[22] In light of the foregoing reasons we concluded that the appellant's appeal was incompetent as the value of the subject matter of the claim was lower than the requisite amount of RM250,000 provided under s 68(1)(a) of the CJA and leave ought to have been obtained but there was none. We accordingly struck out the appeal with no order as to costs.

Appeal struck out with no order as to costs.

Reported by Nabilah Syahida Abdullah Salleh